

DECEMBER 8. 1768.

A N S W E R S

F O R

JAMES KER of *Crummock*, Surgeon in the
Service of the *East India* Company ;

T O T H E

PETITION of JOHN KER, Son of the de-
ceast *John Ker* Wright in *Beith*.

THE late *James Ker* of *Crummock*, father to the respon-
dent, for some years preceeding the 1745, was en-
gaged in fundry law suits, which made his personal
attendance at *Edinburgh* necessary ; and during his
absence from the country, his affairs were managed by his bro-
ther *John Ker*, father to the petitioner.

About the end of summer 1746, *Crummock* died in the castle of
Dumbarton ; and it does appear, that upon that occasion, his bro-
ther *John* went to *Dumbarton*, got what money *Crummock* had a-
bout him, as also his papers, and conducted his brother's corpse
to his burial place in *Ayr* shire.

The respondent being minor at the time of his father's decease,
and without any guardian being appointed to him, *Robert Ker*,
writer in *Kilmarnock*, one of his uncles, became his tutor dative,
and the aforesaid *John Ker* wright in *Beith*, another uncle, who
lived in the neighbourhood of the lands of *Crummock*, &c. de-
scending to the respondent as heir to his father, was continued
factor thereon.

Upon the 24th *April* 1750, there ensued a clearance between
these two brothers, *Robert* and *John*, in their several capacities of
tutor and factor, relative, not only to *John's* intromissions and
manag-

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managment, both for *Crummock* and the respondent, but likewise the money, which, from time to time, he had given to *Crummock* himself. And it will be particularly attended to by the court, that the basis of this clearance, so far as concerned the former period, was a series of annual accompts, commencing as far back as the 1740, and carried down to the 1746, all of *John Ker's* hand writing; some of which, from certain jottings subjoined in *Crummock's* hand writing, appear to have been revised by him; but not having been formally settled and discharged, they remained in *John's* custody, who produced them at this clearance with the tutor; and in the accout then instituted between them, he was, *inter alia*, debited with the balances arising upon these accompts, to the amount of 11 *l. Sterling*, the accompts themselves being also signed by both parties, as relative to that clearance, and delivered up to the tutor, and a docquet subjoined to the general accout then fitted, in the following terms: "At
 " *Beith* the 24th day of *April* 1750 years, The above accout
 " of charge and discharge, is this day settled and adjusted, be-
 " twixt *John Ker* wright in *Beith*, and *Robert Ker* writer in *Kil-*
 " *marnock*, as tutor dative for *James Ker* now of *Crummock*, and
 " the balance of 4 *l.* 17 *s.* 7 *d.* is justly owing by the said *John*
 " *Ker* to his nephew, after the said *John Ker* is allowed and paid
 " of all his debursments, trouble, and expence on his bro-
 " ther and nephew's account preceeding this date, where-
 " of he discharges his said nephew, excepting a bill of 200
 " merks *Scots* of principal, which is yet owing to the said *John*
 " *Ker*; and the said *Robert Ker*, as tutor-dative to his nephew,
 " is satisfied, that the said *John Ker* has accounted for all his re-
 " ceivings and intromissions with his brother or nephew's rents,
 " money or effects, and has cleared his rent due to the said *James*
 " *Ker* for the two little parks, being a part of the lands of *Crum-*
 " *mock*, for 1749, and preceedings; of which rent he is hereby
 " discharged. In witness whereof, &c. And the said *John* and
 " *Robert Kers* have also subscribed the four particular accompts
 " referred to by the above general accout."

John Ker continued factor over the respondent's subjects, (part of which he possessed himself,) till his death, which happened in *December* 1755; and, in *November* 1756, which is almost a full year posterior thereto, there was a clearance between the respondent's tutor and the now petitioner, *John Ker*, relative to his father's

father's intromission and management, and rents due by him, since the clearance 1750, on the one hand, and the 200 merk bill above mentioned, owing by *Crummock* to his father, on the other; and the petitioner having granted his own accepted bill to the respondent for 32 l. 10 s. 4 d. *Sterling*, as the balance arising due upon this final settlement, the parties did mutually discharge each other, conform to the docquetted accompts produced.

This bill was renewed from time to time, and, last of all, upon the 22d *November* 1762, for 41 l. 14 s. 11 d. payable the 6th of *December* thereafter: And, after giving him almost two years further indulgence to pay it up, the respondent, at length, being to leave the country himself, did indorse to his present factor this bill, and another bill for 1254 merks, accepted by the petitioner to *Janet Blackburn*, and by her indorsed to the respondent, in order that his factor might recover payment.

An action was accordingly brought, in name of the respondent's factor, against *John Ker*, for payment of these two bills, before the sheriff of *Ayr*, wherein the defence of payment was proponed by the defender's procurator, in virtue of a mandate from him. But, in order to show how groundless and calumnious this allegation of payment was, there was produced a letter which the defender himself had recently wrote to the pursuer, bearing in substance, that he had been looking out for money to borrow wherewith to pay this debt, but had not succeeded, and proposing to settle it in a particular way, that did not however take effect; and the defender was required to condescend on what part of the sums he had paid, which he having failed to do, decret went against him the 31st *August* 1764.

Upon the 26th *October* thereafter, *John Ker* was personally served with a charge of horning upon this decret. In *December* following, a caption was raised, and put into a messenger's hands, with orders to execute the same, which were made known to *John Ker*, that he might prevent it by payment, and more than once a messenger actually went to apprehend his person; but, during all these proceedings, he never gave the least surmise of his having a counter-claim against the respondent, till *November* 1765, when he offered a bill of suspension, founding upon the 3000 merks bill now in question, which was ushered in with an apology of its having but lately come to his knowledge.

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This discovery, however, which *John Ker* took great care to propale, did not advance either his character or credit in the country; on the contrary, with all this appearance of an additional fund, and which your Lordships fee was much more than sufficient to satisfy the sums charged for, he could not get any person whatever to become cautioner in the suspension, which the respondent's doers had allowed to pass upon caution; but, in place of a bond of cautionry, Mr. *Ker* substituted an action upon the passive titles against the respondent, concluding for payment of this 3000 merks bill; and through his not finding caution, the suspension was never expedite.

The petitioner does now reclaim from a most unanimous judgment of the court, finding, that no action lies on the bill in question; and which, it is said, was owing to an artful representation of the facts in the information for the defender, whereby your Lordships were induced to believe, that the bill had been originally granted without any cause.

But the respondent will be pardoned to think, that on his part no art or disguise was used in stating the fact; and that the plea or argument then suggested in his behalf, did naturally arise from the *species facti*; and, joined with other circumstances which occurred to your Lordships discernment, justly called for such a judgment as hath been given.

It will be remembered, that the chief circumstances submitted to your Lordships consideration in behalf of the defender, were, in substance, the antiquity of this bill, the connection and confidence between the parties thereto, its latency, and lying dormant for such a tract of years, the improbability of the supposed creditor being able to advance such a sum, his own deliberate clearance with the respondent's tutor, confining his demand against his brother *Crummock* to a bill for a much lesser sum, and thereby virtually disowning any other claim; his surivance for so many years thereafter, without any mention of it; and, lastly, the long taciturnity of the pursuer himself, and its appearing at length, at the critical period of his being pressed for payment of a just debt: And the respondent cannot discover that any of these facts are controverted in the petition now to be answered, excepting what relates to the situation of the petitioner's father in point of circumstances, at the time the bill in question bears date.

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In the outsetting, the petitioner reminds your Lordships, that the bill in question bears *value received*, which he says is a legal presumption of the fact; but at the same time he admits, that circumstances may occur to throw the presumption the other way. And this holds particularly in the case of bills; as to which, it is a rule highly founded in expediency, and fixed by the practice of the court, that there does arise a strong presumption against them, where they have been allowed to ly over for any considerable time; and which acquires additional force, where the bill has lain dormant during the lives of both creditor and acceptor.

In the *next* place, it merits attention, that the petitioner has varied not a little, in accounting for the cause of this bill being granted. In his information, it was assumed as a certain fact, that *Crummock* having occasion for 3000 merks, his brother *John* had advanced it to him all at one time; but now, as the petitioner behoved to be pinched to point out any exigency in *Crummock's* affairs that made such a supply necessary, he would rather have it understood, that this 3000 merks was "advanced in different sums, at different times:" And after observing that the bill in question bears date the 24th *August* 1745, four days after *Crummock's* liberation from prison, your Lordships are told, "the case plainly has been, that after having got out of prison, his brother and he came to a clearance, with regard to the advances which had been made to him, and a bill was thereupon granted for the sum in question, being the amount of these advances." p. 5.

But, in the *first* place, it is a certain fact, that at the date of the bill in question, *Crummock* was still in prison at *Edinburgh*, where he remained till the 18th of *September*, on account of a dispute with regard to the jailor's demand of jailor fee, which *Crummock* imagined, or was made to believe was not exigible, as not being mentioned in the sentence pronounced against him; and he at length obtained his liberty upon the rebels getting possession of *Edinburgh*.

In the *next* place, the respondent must beg your Lordships particular attention to a circumstance altogether destructive of the hypothesis now assumed by the petitioner as to what gave rise to the bill in question; which is, that in one of those accoupts afterwards produced by *John Ker*, at the above mentioned clearance with the re-

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spondent's

Accompt, spondent's tutor, in *April 1750*, *John Ker* has actually stated and
 No. 2. taken credit for various articles of cash, as either given or sent at
 P. 2. different times to his brother *Crummock* at *Edinburgh*, from *October 1744*, to *September 1745*, to the amount of *41 l. 5 s. Sterling*; besides which, there is also an article of *5 l.* stated to *Crummock's* debit as sent to him at *Edinburgh* in *September 1745*.

This plainly shews, that at the date of the bill in question there had been no clearance between the brothers respecting the money which *John Ker* had given or remitted to his brother *Crummock* in the course of his law suits and confinement at *Edinburgh*, and indeed adds additional weight to the presumptions wherewith this bill is loaded, that it was granted without any value whatever, and merely as a trust for behoof of *Crummock*.

It is further argued by the petitioner, that the circumstance of protesting and registrating the bill soon after it became due, makes greatly in his favour; for, had it been intended as a cover against *Crummock's* creditors, this was rather the way to bring the whole of them upon him.

But your Lordships will please here to attend to the form of this bill: It is drawn, payable "at the house of *Robert Cameron* " writer in *Beith*," who has been judged a proper person to be entrusted with the scheme concerted by the brothers, and accordingly acted as notary to the protest; and then the protest is immediately slipped into the commissary-court books of *Glasgow*, a more private register than that of the county where the parties lived, and where it was the least liable to be taken notice of. In short, the whole proceedings and circumstances attending this bill speak out, that a loan was not the *actum* here, or the cause of its being granted.

The petitioner further says, that his father was a man in opulent circumstances, for one in his station; and he condescends upon various particulars whereby his father is alledged to have made money, besides the lands of *Fulwood*, which are said to have been left him by his father; and that he was esteemed in the country as a monied man, and was well able to afford 3000 merks to his brother.

As to the lands of *Fullwood*, the petitioner knows that his father had got no right thereto, and he himself owed them to the generosity of the respondent, who disposed them over to him after his majority; and during the life of the petitioner's father,
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the lands were not worth more than 300 merks *per annum*. His business of a wright was not gainful; and the bargains of timber alluded to in the petition, it is well known, brought him under distress; and if he did give himself the air of being a monied man, and imposed upon the country, it is certain the fact was the reverse.

But supposing the whole of the petitioner's allegations on this head were true, the respondent submits to your Lordships, what tendency they can have towards obstructing the bill in question, as granted in consequence of money advanced to *Crummock*, when it is incontestably proved by evidence under *John Kerr* the father's own hand, and his after accounting with the respondent's tutor, that there was no clearance with regard to those advances at the time this bill bears date.

It is next said in the petition, and offered to be proved, that sometime in the year 1745, before *Crummock's* liberation from the tolbooth, one *Fleeming*, a carrier, was employed by *John Kerr* to carry into *Edinburgh* the sum of 1000 merks to his brother, then in prison.

How the petitioner would be able to make good the proof here offered, the respondent knows not; but if he is not misinformed, *Robert Fleeming*, who sometime plied as a carrier to *Edinburgh*, is dead, so that it must rest upon hearsay, which is a mean of proof your Lordships would not lay much stress upon. But the fact itself, though true, *viz.* That the petitioner's father did send 1000 merks to his brother, when in prison, in the year 1745, appears, with submission, too slim an ingredient to obstruct a bill for 3000 merks, as granted on the score of this and other advances, when, in fact, your Lordships see *John Kerr* taking credit for advances about the same period, to a pretty considerable extent, as outstanding and unsettled at the time of *Crummock's* death.

The same observation will apply to what is next offered to be proved, *viz.* That *John Kerr* was in use to borrow money in the country upon his own credit, which, he told the creditors, he was to apply for the use of *Crummock*. The respondent asks, *quid inde?* has he not also taken credit in his accompts, for those very supplies wherewith he furnished *Crummock*?

The petitioner affects to make a great merit of his father's delicacy, in not running off with his nephew's estate by an adjudication,

dication, when there were hopes, that by good management, and a little delay, his affairs might be put into good order.

But, in the *first* place, there was no occasion for any extraordinary indulgence, as the respondent, by his father, succeeded to a free subject of 1500 *l. Sterling*, besides getting 500 *l.* more from his mother, who had a separate subject of her own. And in the next place, were your Lordships even to admit of the plea of indulgence, yet it is altogether inconceivable and repugnant to the idea of this being a just debt, that it should never be once mentioned, or broached in any shape by *John Ker*, the supposed creditor, during his whole life.

Your Lordships will have observed, that at the period of the clearance 1750, more than four years had elapsed from the date of the bill in question, and four years interest of such a sum, was no contemptible object, even to a man of *John Ker's* supposed affluence; nor would it have detracted from the merit which the petitioner ascribes to his father's indulgence, to have brought these annualrents, at least under the eye of the respondent's tutor; and it was most natural for *John Ker* to have done so, upon the supposition that it was a just debt, when he came to make a general clearance *hinc inde*, which this undoubtedly was.

The petitioner, indeed, would have it understood, as relating only to the factory affairs, and thereby endeavours to account for the 3000 merks debt not being then mentioned; and further pretends, that the bill of 200 merks, must have been granted for debursments, or other matters relative to the factory, otherwise it did not fall to be mentioned as an exception in the docquet of that accompt.

But the history of the 200 merks bill is well known, *viz.* that the contents thereof were borrowed by *John Ker*, from a person of his acquaintance for behoof of *Crummock*, to whom he lent the same upon his bill: And your Lordships have the tenor of the docquet before you, which plainly appears to be the result of a deliberate and general clearance, with one quality or exception, that fortifies it as to every other particular, and is tantamount to the most express release, and acknowledgment that there were no other claims subsisting or chargeable against the respondent.

And, consistently with this construction, it is not pretended, that *John Ker*, though he survived this clearance almost six years, did

did ever give the least surmise, that he had such a claim against the respondent.

The relevancy of the reason assigned by the petitioner for this bill being unknown in *John Ker's* family, and particularly to his wife, is submitted to your Lordships, with this single observation, that it was surely the best apology which *John Ker* could have made to his wife, for launching out so considerably in his advances for *Crummock*, to have informed her, that he was possessed of a document that secured his payment.

The petitioner goes on to inform your Lordships, that in order to compensate this debt in part, *it appears*, that his father borrowed from the respondent's mother, the sum of 1200 merks, and the mother's chief motive for lending *John* this sum, the petitioner *supposes* to have been, to prevent him from doing diligence against her son's estate.

But the fact as to this loan is, that it was made in the 1750, to enable *John Ker* to carry on a distillery in which he had then engaged, and for which he paid interest, and renewed the bill for the principal from time to time: And the nature of the transaction plainly shows, that it did not proceed from the sense or understanding of either party, that there was a debt owing to *John Ker* by the respondent, or had any the least reference thereto. In 1759, the petitioner gave his own bill abovementioned, for 1254 merks, as the amount of this debt.

The petitioner next says, " what shews very clearly, that *John Ker* understood himself to be a richer man than he turns out to be without the 3000 merks in question, is, that he frequently declared his intention of leaving 1000 merks to each of his seven younger children, besides his moveable effects, and the liferent of a house to his wife, which provisions he could not have ever thought of making, but on the consideration that the 3000 merks was a bill due to him; for, that this would have been throwing a burden of 7000 merks upon the mailing of *Fulwood*, which it was unable to bear."

According to the respondent's information, it was the father's intention, who had no predilection for the petitioner, to make all the rest of his children equal with him, but he happened to die before executing his settlement; and it would have had some more appearance of relevancy, had the petitioner offered to prove, that his father had ever signified or declared to any mortal, his being

possessed of a bill for 3000 merks, for making good these provisions.

The petitioner, sensible that his own taciturnity in regard to this bill, for the space of ten years after his succeeding to his father, is a circumstance that must strongly strike against him in the present question, proceeds to tell your Lordships, that it was owing to the sudden death of his father, and to his having left no state or *vidimus* of his affairs, that he, the petitioner, had remained for some time in total ignorance of the 3000 merk bill; that he had lived mostly in *Edinburgh*, and other places at a distance from his father's family, and happened only to return home a few weeks before his father died.

It is true, that the petitioner may have been about a year at *Edinburgh*, and a year or two more at *Glasgow*, learning his trade; but your Lordships know, that *Glasgow* is at no great distance from *Beith*; and in fact, the petitioner came very frequently there to visit his parents; and he himself admits, that he had been some weeks at home before his father died.

That the petitioner's father died suddenly in the night time after going to bed in perfect health, is by no means a just representation of the fact; for it is notour, that he had been in a lingering state, and deeply consumptive for twelve months at least; and so sensible of his approaching death, that he communicated to many of his friends, his intention of making a settlement of his affairs, and took their advice thereon, but to none of them did he ever disclose his being possessed of such a claim as 3000 merks owing by his brother *Crummock's* heir.

The respondent would ask the petitioner, from what state or *vidimus* he picked up the knowledge of the 200 merks bill, for which he took credit in the clearance 1756, or how it happened that he should be possessed of that document and not of the other?—The respondent can easily see a reason, why this last was not mentioned at that clearance, nor during the life of *Robert Ker* their common uncle, who must have been well acquainted with the whole circumstances concerning it, as being the brother of both the original parties to this transaction.

The *Æra* too of this bill's making its appearance, is not a little remarkable, *viz.* After decret had passed against the petitioner in the inferior court for payment of those bills which he owed the respondent,

dent, and the account which the petitioner gives of the manner in which it was found, will not increase your Lordships opinion of this bill. But what the respondent has further heard historically concerning it, gives him perfect conviction that it was altogether a *manœuvre* of the petitioner's, when drove to his last shift, with a view to establish a colourable pretence for the latency of this bill; as also, that the proof now demanded by the petitioner, is merely calculated to put off the evil day a little longer.

The respondent, however, is hopeful it will appear to your Lordships, that the whole circumstances now alledged by the petitioner, though they were true in fact, would not be available or sufficient for astructing the bill in question, when put in the scale with those pregnant facts and circumstances, upon which your Lordships proceeded in determining this cause; and that therefore, the petitioner's demand of a proof will be rejected, and the former interlocutor in favours of the respondent adhered to.

In respect whereof, &c.

WILL. WALLACE.



